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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 324

314-636

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,

Petitioner.

vs.

HARRY A. MALONEY,

Respondent.

PETITION FOR *CERTIORARI* AND BRIEF IN SUPPORT THEREOF.

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Petition for *Certiorari.*

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,
Petitioner,

vs.

HARRY A. MALONEY,
Respondent.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of James C. B. Millard, as executor of the Estate of Jay Gould, deceased, respectfully shows unto your Honors:

A.

Summary Statement of Matter Involved.

This is an estate tax case. The petitioner paid to the respondent under duress and protest as a Federal estate tax on the Estate of Jay Gould, deceased, hereinafter sometimes referred to as the decedent, the sum of $190,892.30.

The petitioner brought an action against the respondent, who was Collector of Internal Revenue for the First District of New Jersey, to recover back the amount paid as aforesaid, as illegally assessed and collected. There is no dispute as to the value placed by the Commissioner, but the question is solely one of taxability. The Commissioner included in the Estate of Jay Gould for Federal Estate Tax purposes, two certain items, reference to which was made in the Estate Tax Return for information purposes only. The return as filed showed no net taxable estate.

These two items are set forth in detail in paragraph 9 of the Complaint (R. 4).

The first is the inclusion in the estate of the value of the property constituting the subject matter of a trust set up by the decedent in 1922 in his lifetime.

The second item consists of the commuted value of certain payments payable directly to the plaintiff as Executor of Jay Gould under and by virtue of the provisions of a Judgment of the Supreme Court of the State of New York, entered pursuant to a stipulation for compromise, of a suit in that court involving the accounts of the Executors of and Trustees under the Will of Jay Gould, the First, grandfather of the decedent.

We deal first with the Deed of Trust which is Exhibit A annexed to the Complaint (R. 19). By that document the decedent who was then 34 years of age and in the best of health, assigned to his Trustees his remainder interest in the Will of his grandfather, Jay Gould, the First, who died in the year 1892.

The grandfather was survived by his six children, George, Edwin, Howard, Helen, Anna and Frank. His Will provided that the residue of his estate was to be divided into six equal parts, one for each child, who was to receive the income from that part for life, and upon his or her death, the principal was to be paid to his or her issue.

The material parts of the Will of Jay Gould, the First, are recited in the Deed of Trust by the decedent (R. 19).

Our decedent's father, George J. Gould, died in May, 1923. In his Will (R. 76) he directs that the remainder interest under the grandfather's Will be equally distributed among his seven children, of whom the decedent was one.

Thus on the death of George J. Gould in May, 1923, there vested in possession (except for the Deed of Trust), in our decedent, one-seventh interest in the principal of the Trust set aside by Jay Gould, the First, for his son, George, and such share was, pursuant to the Deed of Trust hereinabove mentioned, thereupon paid over to our decedent's Trustees named under such Deed.

By this Trust deed executed as we have seen, in 1922, our decedent reserved to himself the income for his life and with respect to the principal,

> "Upon his death * * * forthwith to pay over * * * the principal of the Trust Fund * * * to the lawful descendants of the party of the first part in such proportions as the party of the first part shall in and by his last Will and Testament appoint, and in case of failure to make such testamentary appointment then to such descendants absolutely, in equal shares, per stirpes and not per capita; * * * It is understood and agreed however anything herein con-

> tained to the contrary notwithstanding that the party of the first part may by Will charge the Trust Fund with the payment of the income of said fund or any part thereof to the use and for the benefit of the wife of the party of the first part during her life or for any shorter period." (R. 22.)

The Testator's wife and three children survived him (R. 51).

Our decedent in and by his Will exercised the special power in favor of his wife and charged the principal of the Trust Fund with the payment of its income to her for her life, but he did not execute the special power to change the proportions among his descendants but permitted the principal to go in default of appointment (R. 75).

At the time of the execution of the Trust our decedent was 34 years of age, in excellent health and the trust was made at the request of his father because the decedent was largely indebted and had shown himself to be a spendthrift and it was made to protect himself, his wife and children (R. 70). The decedent died in 1935.

The Commissioner of Internal Revenue determined that the value of the Trust Estate was a transfer, although made in 1922, within the meaning of Section 302 (d) of the Revenue Act of 1926 as amended.

There was, however, no contention by the defendant in the Court below that the Trust was made in contemplation of death or intended to take effect in possession or enjoyment at or after death within the purview of Section 302 (c). The sole contention litigated in the Courts below with respect to the Deed of Trust was that subdivision (d) which

was first enacted in 1924 could be applied retroactively to the Deed of Trust made in 1922.

The petitioner contends that this could not be done without violating the Fifth Amendment to the Constitution of the United States.

The second half of the case involves something entirely different. We have seen that Jay Gould, the First, our decedent's grandfather by his Will divided his entire estate into six equal parts, one of which to be held in trust for each of his six children for life, and upon the child's death, to pay the principal to his or her issue, in such proportions as he or she might direct by Will, and failing such, then to such issue, in equal shares per stirpes and if no issue, then to his or her brothers and sisters, and the issue of any deceased brother or sister, in equal shares per stirpes (R. 19). The Executors and Trustees accounted in the Supreme Court of the State of New York and numerous objections were filed which resulted in an opinion by the Referee indicating surcharges against the Executors and Trustees then living, Edwin, Helen, Howard and the Estate of George J. Gould, who had died pending the litigation of upwards of $40,000,000. Many claims and counterclaims were made against each other by the parties to that action. The litigation extended to the Court of Chancery of New Jersey. After many years the questions became so involved that the litigants decided to compromise.

In the negotiations leading to that compromise it was considered that since Helen and Howard Gould, two of the children of the common ancestor had no children of their own and were not likely to have any, and that consequently upon their deaths the portion of the principal set aside

under the Will of Jay Gould, the First, for each of them, would come to the children of George J. Gould of whom our decedent was one. Surcharges, of course, are ordinarily payable, forthwith, but in view of the size of the surcharges and the fact that the children of George J. Gould would thus, in all probability receive a substantial portion of the principal of the Trust Fund set aside for Helen and Howard Gould, two of the surcharged Trustees, a sum commensurable with the estimated value of such anticipated or deferred share was allowed as a credit against the surcharges payable. The Stipulation for Compromise and the Judgment thereon provided that in order to make up for the loss of income from the deferment of the vesting in possession in the children of George J. Gould of those amounts, that Edwin, Helen and Howard should pay annually, in equal shares to the seven children of George, while Helen and Howard lived, a sum of $54,000. and after the death of one of them, and during the life of the survivor, the sum of $30,000. Such payments were to be made to those seven children during their respective lives and after their deaths, and during the life of the survivor of Helen and Howard, to their respective executors or administrators (R. 45).

There was no provision in the Judgment (R. 45) for the setting up of a fund to guarantee or in anywise provide for the continuance of those annual payments. The Judgment simply imposes a personal obligation on the payors.

The Commissioner of Internal Revenue ruled that all of such annual payments received by our decedent in his lifetime constituted income in his hands for income tax purposes and he paid the income tax thereon each year. Nevertheless the Commissioner also ruled that the com-

muted value at the date of our decedent's death of the annual payments which might be receivable after his death, contingent though they be, should be included in his gross estate for estate tax purposes. The petitioner, of course, contends that they should not be so included, but that each annual payment, if, as and when received, will be income to the recipient.

The case was tried before his Honor, Judge Forman, without a jury. The Judge filed a written opinion (R. 77) findings of fact and conclusions of law (R. 89) and rendered judgment in favor of the defendant on both points.

And appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, which Court affirmed the District Court, Circuit Judge Biggs writing the opinion (R. 99). It is to review that judgment that the petitioner now petitions this court.

B.

Reasons Relied On for Allowance of Writ.

The statute under which jurisdiction is conferred on this Court is Title 28 § 347 of the United States Code, being the Act of February 13, 1925, C. 229, § 1, 43 Stat., 938. This statute, so far as material, reads:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court,

> that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

In affirming the judgment of the District Court, the Circuit Court of Appeals decided that an irrevocable transfer made by the deed of trust of 1922 and absolutely vested when made in a limited class of beneficiaries, consisting of the settlor's wife and descendants, from which class the settlor (our decedent) could not divert the fund, and transferred beyond the recall of any portion thereof to the settlor, made in 1922, might be reached by the retroactive application of sub-division (d) of § 302 of the Revenue Act of 1926 as amended, without violating the Fifth Amendment to the Constitution.

In so affirming the Circuit Court of Appeals also decided that annual payments receivable by our decedent pursuant to a judgment payable by two persons (other than the decedent) during the life of the survivor of them, and payable to the decedent for his life, and after his death to his executor or administrator, where no fund is set up as a guaranty to produce such annual payments, constitutes an asset to be capitalized on a commuted basis, and as such includible in the decedent's gross estate.

In each of such holdings the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court, and has decided a Federal question in a way probably in conflict with the applicable decisions of this court.

In the first of such holdings, that dealing with the Fifth Amendment, the Circuit Court of Appeals for the Third Circuit rendered a decision in conflict with the Circuit Court of Appeals for the Second Circuit.

Wherefore your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the cause therein entitled James C. B. Millard, as executor of the *Estate of Jay Gould, deceased, Plaintiff-Appellant* vs. *Harry A. Maloney, Defendant-Appellee,* No. 7643; and that the said judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the said cause on the 6th day of June, 1941, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court should seem meet and just.

And your petitioner will ever pray, etc.

JAMES C. B. MILLARD,
As Executor of the Estate of Jay Gould,
Deceased, by
GEORGE W. C. MCCARTER,
Of Counsel for Petitioner.